

February 12. 1766.

N S W E R S

F O R

Marion Scot, one of the three surviving children  
of the deceased Robert Scot merchant in Glasgow;

T O

the PETITION of John Watson of Muir-  
house.

BY contract of marriage, of this date, between the July 5.  
said Robert Scot and Agnes Stark, the respon- 1705.  
dent's father and mother, there is provided to the  
children of the marriage L. 8000 Scots; and cer-  
tain tenements in Glasgow were disposed in security  
thereof.

Robert Scot died in 1727, and left two sons, viz. An-  
drew and Robert, and five daughters, viz. Margaret, Janet,  
Mary, Jean, and the respondent. Andrew, the eldest son,  
on his father's death, made up titles to the above-men-  
tioned tenements, as heir to his father, without paying  
regard to the interest which his brother or sisters had  
in these subjects.

Andrew, being unluckily engaged as cautioner for a re-  
spondent, failed in his circumstances about the end of the  
year 1740. At that time his sister Jean was married; but  
in order to do some justice to his brother and his other  
children, who had been infants at his father's death, and  
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who had nothing to trust to but the provisions in the contract of marriage, he, of this date, disposed such of the above-mentioned tenements (as he had not sold) to Robert his brother, and Mary, Margaret, Janet, and the respondent, four of his sisters, for security to them, their heirs or assignies, of the sum of 1000 merks to his brother, and 600 merks to each of these four sisters, all bearing annual-rent from Lammas 1740. Upon this disposition infestment was taken on the 2d June 1740. Your Lordships see this disposition was but a small reparation for the loss of the sums contained in the contract of marriage.

April 12.  
1740. Of this date the petitioner, Mr Watson, as a creditor of Andrew Scot's, led an adjudication of those tenements, and, after taking the other necessary steps, brought a process of ranking and sale of Andrew's subjects.

In the beginning of this process, Robert Scot and his four sisters compeared, and produced, as their interest, the above-mentioned disposition in security; and, upon their pleading, That this disposition was supported by the contract of marriage, they were found preferable to the adjudgers; 1<sup>st</sup>, By several interlocutors of the Lord Justice-Clerk Ordinary; and thereafter by a final judgment of the Court, on the 13th June 1760. After this the decret of ranking went out, and the subjects were disposed of at a judicial sale.

Before this time, Robert, and three of the four sisters, as well as the children they had left, had died. The petitioner, Mr Watson, who had all along disputed every point, and neglected nothing to get the better of the contract of marriage and the disposition, being advised, that the shares of the persons deceased, after their issue had failed, fell to Andrew Scot, the only surviving brother, his debtor, he charged Andrew to enter her in special to his



his brother and sisters, and led an adjudication of their interests in the tenements, of date 16th December 1761.

The petitioner produced this adjudication, with an arrestment which he had used in the hands of the factor, of such sums as Andrew should be intitled to draw from him as heir to his brother and sisters; and as the other creditors were not, (agreeable to the ordinary form), allowed to see this new interest produced for Mr Watson; so no opposition was made, and he obtained, from the Lord Ordinary, the two interlocutors mentioned in the fourth page of the petition, by which your Lordships will observe Mr Watson is found intitled to draw not only the deceased childrens parts of the principal sums in the disposition in security, in which their brother Andrew succeeded to them, but also the annualrents thereof, which had become due to them before their death, which doubtless belonged to the respondent, and the childrens other nearest of kin, and not to Andrew the heir.

Jean Scot, the only surviving sister, beside the respondent, having obtained a decret of the bailies of Glasgow, against Andrew, for himself, and as representing his father, for her share of the provision in the contract of marriage, had likewise charged him to enter heir in special to his deceased brother and sisters, and had obtained an adjudication against him, of this date, viz. eight months after the date of the adjudication led by the petitioner; she, on that ground, represented against the interlocutor preferring Mr Watson, and craved to be ranked *pari passu* with him, as her adjudication was within year and day of his; and this question depends at present before the Lord Ordinary.

Aug. 10.  
1762.

William Wilson writer to the signet, the respondent's agent, had been at the whole expence, and had advanced whatever was necessary in the process for ascertaining the preference of Robert Scot, and the four sisters, upon the disposition

disposition in security granted by Andrew, and kept possession of the writings to insure his indemnification. The respondent, therefore, offered another representation to the Lord Ordinary against the interlocutor preferring Mr Watson, setting forth, That as she and her agent had been at the whole expence of supporting the disposition in security, upon which Mr Watson founded his claim, that, therefore, she was intitled to be preferred upon the sums to be drawn by him, for a proportional part of that expence.

Jan. 14.  
1766.

Upon advising answers, given in for the petitioner, and replies for the respondent, the Lord Ordinary, of this date, pronounced the following interlocutor: " Having considered this representation, with the answers thereto for  
" Mr Watson of Muirhouse, and replies for the representer, finds, That the shares of the wadset-rights, for  
" payment whereof Robert, Margaret, Janet, and Mary  
" Scots stand severally preferred by the decret of ranking,  
" fall to be burdened with a just and rateable proportion  
" of the expences disbursed, in supporting and rendering  
" effectual that right, the same being the common interest  
" produced in the ranking for them and the representer,  
" in virtue whereof they and she obtained their said several  
" preferences therein."

Mr Watson, who has, from the beginning, shown a resolution of contending every point to the last, has reclaimed to your Lordships against this interlocutor. These answers are humbly offered on the part of Marion Scot, to his petition.

The respondent shall, in the *first* place, show your Lordships the foundation of her claim, and shall thereafter endeavour to obviate the objections which have been thrown out by the petitioner.

Before entering upon the argument, she will beg leave to observe to your Lordships, That Mr Watson is not the  
only



only sufferer by her claim : She only demands from him such a proportion of the expence laid out by her, as shall answer to the sum which he shall be found intitled to draw : The respondent herself will pay that part of the expence which answers to her share of the wadset-right, and her sister Jean will be liable for that proportion which shall correspond to what she is intitled to by her adjudication, led within year and day of Mr Watson's.

It would be unnecessary for the respondent to take up your Lordships time in proving, that her claim is equitable ; that is, admitted by the petitioner himself, and indeed is not possible to be denied. He owes the very title upon which he now claims, to the trifling expence of which the respondent desires to be indemnified : And he does not pretend, that the respondent was guilty of any extravagance in the management of this affair. He cannot deny, that if she had neglected it, he must have laid out the same expence himself, or have lost his claim ; and therefore that the respondent, by ascertaining the preference upon this disposition in security, has really put so much money into his pocket ; besides, at the same time, saving him the anxiety and trouble of a law-suit.

The respondent's claim being so evidently equitable in the highest degree, it is not doubted, even if it was not supported by precedent and authority, and if the petitioner's doctrine had been followed by decisions, that your Lordships, as a supreme Court, would never allow such an iniquitous rule to prevail, but would take the first opportunity of remedying such a defect in our law. But the respondent has not this point to struggle ; her plea, she apprehends, is supported by law as well as by reason.

The respondent's claim is founded upon these two self-evident principles, *Iniquum esse alterum, cum alterius jactura, locupletiore fieri* ; and, That every man ought to be in-

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demnified

damned of that expence by which *totius rei causa salva facta est*.

It will not be denied, that, in general, those two principles are well founded. The respondent, in order to ascertain her claim in law, shall consider what weight has been given to these rules in the particular cases where, from the circumstances, exceptions might seem to arise to the general doctrine laid down by the above maxims; and in considering such cases, answers will naturally occur to several of the defences which have been pleaded by Mr Watson.

This principle, *Nemo locupletior fieri*, &c. (which might indeed almost pass for a definition of the consequence of justice itself), by most authors is thought to be liable to no exception. Lord Stair says, " This remuneration is a most  
" natural obligation; and therefore this is a common  
" exception in all positive laws, that every one should be  
" liable *in quantum locupletior factus sit*.

The first exception that seems to occur to this doctrine is, when it appears that the person who claims to be indemnified, laid out the expence entirely with a view to his own profit and without any intention of bestowing a benefit upon the person from whom he claims the recompence; and, in this case, it may be answered by the defender:  
" As you had only your own advantage in view, you cer-  
" tainly had no claim against me. If you have succeeded in  
" your plea, you have got your end; if you have failed,  
" you have judged ill in not foreseeing the consequences,  
" and must take better care in time to come."

This objection is pleaded by the petitioner, but the equity of the general rule, *Nemo locupletior*, &c. is so strong, that the intention of the party who has suffered is not at all considered. The fact is enough for him, that another person has gained by his loss. It is laid down expressly by Voet, *lib. 3. tit. 5. § 13*. That "*Si quis aliena negotia*  
" *gesserit*



"*gesserit tanquam sua, conditio indebiti datur.*" By our law this has been decided in many different cases: In the remarkable case 2d July 1725, Campbell *contra* the creditors of the equivalent, mentioned in the Dictionary under the title *presumption*; and in the case, 30th July 1715, creditors of Calderwood *contra* Borthwick, collected by Mr Bruce, "where one, of many creditors pursuing the common debtor's relict, as having got a disposition from her husband in trust for payment of his debts, and recovering sentence against her, but nothing thereon being extracted, and the other creditors thereafter compearing, the said first creditor was found preferable for his expences, to be paid out of the first and readiest of the subject." Twenty authorities might be cited by the respondent to the same purpose; but it would be improper to take up the time of the Court in proving a point so established.

The next case which falls to be examined, in considering the general rule, *Nemo locupletior*, &c. is where *A* lays out expence with a view of procuring advantage to *B*. but, in the end, it appears that *C*. is the true proprietor of the subject or right ascertained by *A*.; and whether, in such a case, *A*. is intitled to a claim of recompence from *C*. who may say, that the favour was intended for another, and that therefore nothing can be claimed from him.

This case applies to the respondent's situation, as well as the last. As she was partly following out her own right, she was likewise in part ascertaining the claim of her brother and three sisters, or those who might be their heirs, which she had not law enough to know. Mr Watson has now come in their place; and because his benefit was not originally intended, refuses indemnification to the respondent.

In this case, as in the former, it is established by numerous authorities, that the equity of the general rule prevails;

prevails; and that the intention of the person who has suffered the loss, is not to come into consideration, nor to deprive him of his just recompence. Voet says, *b. 3. tit. 5. § 12.* “ *Quidenim si se Titii negotia gerere arbitretur, cum ea non Titii sed Mævii essent? adversus Mævium hoc causa effi-* “ *caciter agi responsum est; l. item, &c. 5 § 1. l. Si pupilli,* “ *6 §, &c. Titii, 8 ff. h. t.; arg. l. 29. ff comm. divid.; l.* “ *Quæ utiliter, 45 §. ult. ff. h. t.*

But so far is there from being any doubt, that a recompence is due in the cases above mentioned, (the strength of the equitable obligation is so great that one man should not suffer for the advantage of another), that it is agreed upon, and laid down by all lawyers, and followed by our decisions, that if *A* lays out money with a view to the advantage of *B.* even although *B.* disapprove of the expence and absolutely countermand it, yet if the matter turns out prosperously, and *B.* in reality receives advantage from it, his disapprobation will not stand him in stead, but he will be obliged to refund to *A.* the expence which he has laid out, if it does not exceed the advantage which accrues to *B.* from the ascertaining of his right. Voet lays down this as according to equity, *b. 3. tit. 5. § 11.*; and in a decision mentioned by Lord Stair, 6th January 1676, Forbes *contra* Ross and Paterson; where three persons having a joint-right to a mill, at first concurred in a declarator of thirlage. Two of them having afterwards disclaimed the process, the third carried it on, and obtained decret of declarator. Notwithstanding of the disclamation, he was found, by the Court, intitled to recover from the other two their proportion of the expences to the end of the plea.

Were it necessary for the respondent's cause, or did it apply immediately to the present case, your Lordships know it might be observed, that even he who possesses the subject of another in *mala fide*, is intitled to indemnification



tion for such reparations as have turned out really profitable to the *verus dominus*. It appears, therefore, that the principle, *Nemo locupletior*, &c. is so strongly founded in justice, that no circumstance, not the want of intention of benefiting the person from whom the recompence is claimed, not his absolute disapprobation, nor even the *mala fides* of him who has laid out the expence, is sufficient to deprive this rule of its effect.

The justice and necessity of the above mentioned principle appears, if possible, still in a stronger light, when by the expence which has been laid out, *totius rei causa salva facta est*. Where a person owes not only the melioration of a subject to another, but even the very existence of it, it appears unnatural, in the highest degree. It is in some measure like a child refusing aliment to his parent, to deny, that he who has created the subject to him, should have a claim against it for the money which he has laid out; and accordingly, it is believed, that it never was before disputed, that, in such a case, indemnification and retention should be allowed to the person who had laid out the expence.

The respondent having thus fully set forth the foundation of her claim, shall consider very shortly the defences which have been urged by the petitioner, as they have been mostly obviated in what has been already stated.

It is objected, in the *first* place, That the expence laid out by the respondent was necessary for the establishment of her own right, and that therefore she has no claim. It has been already fully shown, that the intention of benefiting the party from whom the indemnification is craved, is not in any degree necessary in cases similar to the present.

The petitioner, *2dly*, insists, That although the respondent has a good claim against her brother Andrew, yet she has none against him; and that the security of the records

Object. 1.

Answer

Object. 2.

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would

would be infringed, if the respondent's claim was to be listened to, as it could not be discovered from any register.

Answer. If it be allowed that the respondent has a claim against Andrew, it does not appear how the petitioner can be relieved from it. The respondent laid out her money with as little view to benefit Andrew, as to procure an advantage to the petitioner. The immediate effect of ascertaining the disposition in security, was the advantage of her brother Robert, and her three sisters, and their heirs. Andrew was at that time entirely out of the play, and no more in the respondent's view than the petitioner was; Mr Watson, therefore, by admitting that the claim is good against Andrew, admits likewise that it must be good against himself.

What the petitioner means by the "security of the records being unhinged," if this claim should be sustained, the respondent is at a loss to understand. The records provide for the security of purchasers, and for the security of creditors, when they lend their money; but it was never pretended, that by putting a claim in the records, that claim should be made effectual, although *ab ante* it had no foundation. A purchaser or creditor is certain, upon looking the records, that no claim is good which is not there; but he is not certain, that every claim which is recorded will be effectual to the full extent. The petitioner, by his adjudication, affected the right which Andrew had to the tenements in question; but Andrew's right was burdened with the respondent's claim. The petitioner's diligence could not extend Andrew's right, nor could it transfer to Mr Watson what really did not belong to his debtor. Mr Watson, by his diligence, secured his preference, in so far as his debtor had a right to these subjects. To pretend that it could have any farther effect, is evidently without any sort of foundation.

Where



Where a right is, by its nature, extinguishable, and has been extinguished either in whole or in part, it cannot surely be pleaded, that, by adjudging such a right, it becomes entire, and that that part of it which has been paid, or otherwise extinguished, revives, merely by leading a diligence upon it. Let it be supposed, that the respondent had been debtor in an heritable bond to Andrew, and had paid one half of the sum, for which she had Andrew's discharge, if Mr Watson should, as Andrew's creditor afterwards, adjudge this bond, he certainly would not expect to succeed in pleading, that the respondent should be still obliged to pay the whole sum, because her discharge was not upon record. In the present case, the respondent's claim is still stronger; for neither Andrew, nor his authors, had a right to the sums contained in the disposition in security, till the expence of making it effectual was paid, which was a burden inherent upon their claim, from the nature of the thing.

The petitioner puts the case, that an heritable bond had been granted to Andrew and his sister, and that Andrew's share in it had been purchased or adjudged by the petitioner, and he denies that any expences laid out by the respondent, in support of this heritable bond would be a foundation for an effectual claim against him.

The respondent must differ in opinion, in this particular, from Mr Watson; and, she apprehends, that as Andrew undoubtedly would have been liable to her claim, that the person adjudging from him, could claim no more than the interest which Andrew really had in it. But the present case, your Lordships will observe, is more favourable for the respondent. Her brother Robert, and her sisters, to whom Andrew succeeded, were proportionally liable to this claim. Andrew could not succeed to more than belonged to them; so that his right was burdened from the  
very

very beginning with this claim ; whereas, in the case put by the petitioner, it is supposed, that the claim arose after Andrew's right began, and was established in his person. It may likewise be observed, that Mr Watson cannot, in reality, plead any ignorance with regard to the present claim, as he was a party in the competition, and knew perfectly, that the whole expence had been laid out by the respondent.

The danger of introducing new hypothecs, unknown in the law, the petitioner apprehends does not apply to her claim, as it is founded upon the strongest principles of law, and the cutting it off would clearly have the most iniquitous consequences : And the principle upon which it depends has appeared so just to the legislature, that where it has provided that a new benefit is to arise to one person from the expence of another, it is likewise commonly ordered, that the person to whom the privilege is given, should pay his share of the expence, as in the case of adjudgers within year and day, who claim the benefit of the first adjudication.

And your Lordships know, that, in cases which occur every day, to wit, processes for the division of common-ties, and processes of ranking and sale, where one proprietor or creditor brings on the division or sale entirely upon account of the advantage he has to draw from it himself ; yet, in such cases, all who draw any posterior benefit from such processes, are obliged to contribute their share of the expence, and in so far to indemnify the original raiser of them, although he had not the least intention of doing them a favour when he laid out that expence. These, and many other examples which might be mentioned, show, that the principle upon which the respondent claims, is not new, or unknown in our law, as indeed it is impossible that it should be, in any law which has subsisted for half a century.

The



The last argument used by the petitioner, where he acknowledges, that, if the expences had been laid out by the respondent after the adjudication, he would have been liable ; but denies that there can be any claim against him for what was expended before that step, must go upon this supposition, that the respondent's claim is worse, for having been established against the authors of Andrew, and against Andrew himself, who is the petitioner's author, which is an assertion to which the respondent cannot agree.

If there were any doubt that your Lordships would sustain the respondent's claim, she would humbly apprehend, that her agent, who has in reality laid out the money, and holds the papers for his security even against her, would be intitled to a right of hypothec, or retention of the writings themselves ; and that this retention would be good against Mr Watson, in the same manner as it would have been against Andrew, or is against the respondent.

The respondent will not trouble your Lordships with a recapitulation of what has been said. She has no doubt that your Lordships will be of opinion, that as the respondent's claim is, in the strongest manner, supported by equity, so it is likewise well-founded in law ; and that you will adhere to the interlocutor of the Lord Ordinary ; and will likewise allow the respondent the expence of supporting that judgment out of the common fund, which owes its very existence to her.

*In respect whereof, &c.*

J A. FERGUSON *junior.*

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